

STATE OF MICHIGAN
COURT OF APPEALS

CLIRTIE J. STOUDEMIRE,

Plaintiff-Appellant,

v

GREAT LAKES STEEL, RICHARD E. BARKER,
and DAVID HALE,

Defendants-Appellees.

UNPUBLISHED

April 23, 1999

No. 201323

Wayne Circuit Court

LC No. 95-527280 NO

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

I

Plaintiff, a black man, began working for Great Lakes Steel in 1955. The work at Great Lakes Steel generally involves the process of rolling, shearing and preparing steel to be delivered to customers in coils of specified thickness and size. Plaintiff worked on the 74" shear line. There were approximately ten different positions along the shear line, and plaintiff worked as a feeder. Plaintiff's work involved him actually feeding the coil of steel into the line which sets the entire process in motion. Plaintiff was the only black person that worked on the shear line.

In 1994 there was a reduction "in expected/planned number of coils or tonnage of steel that was being processed on the 74-inch shear line," demonstrated by a statistical analysis of the plant's output. Through testing reports it was established that when plaintiff was on the job there was a reduction in the coils/tonnage processed. According to the affidavits of both defendants Hale and Barker, "[t]he specific problems with [plaintiff] was that he failed to remain aware and focused on the job and caused unnecessary delays through dilatory tactics and a poor work attitude." Plaintiff received numerous disciplinary notices including: a written warning for negligent performance of job responsibilities on May 6, 1993; a written warning for failing to report to work on time on June 24,

1994; a written warning for failing to properly perform job responsibilities on June 15, 1994; a two day suspension notice for being insubordinate and failing to properly perform his job responsibilities on November 1, 1994; a five day suspension letter for misconduct on November 4, 1994; and a five day suspension letter for misconduct on December 20, 1994. Following plaintiff's disciplinary action in December 1994, plaintiff was disqualified from the feeder position, but he was still eligible to return to work. In January 1995, plaintiff retired.

Plaintiff filed a complaint, claiming that defendants, in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MS 17.428(1) *et seq.*, racially discriminated and harassed him and that the discrimination and harassment increased after plaintiff filed a claim with the Michigan Department of Civil Rights on November 7, 1994. Plaintiff alleged that as a result of the discrimination and harassment, he was constructively discharged. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), and plaintiff now appeals.

II

This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court must review the trial court record to determine if the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); MCR 2.116(G)(3)(b). The party opposing summary disposition carries the burden of showing through documentary evidence that a genuine issue of material fact does exist. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The existence of a disputed fact must be established by admissible evidence, and it is not sufficient to promise to offer factual support at trial to establish the existence of a disputed fact. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). All inferences are to be drawn in favor of the nonmoving party. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997).

Plaintiff first argues that the trial court erred in granting defendants summary disposition regarding his racial discrimination claim. We disagree. The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Sisson v U of M Regents*, 174 Mich App 742, 746; 436 NW2d 747 (1989). Plaintiff's discrimination claim is based on a theory of disparate treatment. To establish a prima facie case of race discrimination in a disparate treatment case, a plaintiff must show "(1) that he was a member of the class entitled to protection under the act, and (2) that, for the same or similar conduct, he was treated differently than one who was a member of a different race." *Id.* at 746-747.

Here, plaintiff, as a black male, is a member of a protected class. As to the second prong of the test, plaintiff asserted that he was disciplined for conduct for which non-minority employees were not disciplined. However, plaintiff merely alleged that he was treated differently than non-minority employees for the same or similar conduct, and failed to produce any evidence to establish this allegation. The non-moving party may not rest on mere allegations to show that a genuine issue of material fact exists. *Patterson, supra*, 447 Mich 432. Therefore, plaintiff failed to show through

admissible evidence the existence of a genuine issue of material fact regarding plaintiff's racial discrimination claim, and the trial court did not err in granting summary disposition to defendants on this claim.

III

Plaintiff contends that the trial court erred in granting summary disposition regarding his racial harassment claim. We disagree. To establish a case of racial harassment on the basis of a hostile work environment a plaintiff must show: (1) he belonged to a protected group; (2) he was subjected to communication or conduct on the basis of his protected status; (3) he was subjected to unwelcome conduct or communication involving his protected status; (4) the conduct was intended to or in fact did substantially interfere with his employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. See *Quinto v Cross and Peters*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993).

Plaintiff failed to show through any evidence that he was subjected to unwelcome communication or conduct on the basis of his protected status. Plaintiff stated at his deposition that a fellow employee made a statement that he did not like blacks. Although a "single incident may be sufficient to constitute a hostile work environment if severe harassment is perpetrated by an employer in a closely knit working environment", *Radtke, supra* 398, this single incident does not rise to the requisite level of severity. In the context of sexual harassment, our Supreme Court has held that one "extremely traumatic experience", such as rape or violent sexual assault, may rise to this level. *Id.* The co-worker's alleged statement about not liking blacks, however, is not of comparable severity to rape or sexual assault, and will not suffice to establish a racially hostile environment. See also *Quinto, supra*, 371-372 (plaintiff's affidavit not sufficient to establish hostile environment because "it consisted [of] mere conclusory allegations and was devoid of detail that would permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed").

Furthermore, even if plaintiff could establish that the environment was sufficiently hostile, his claim would still fall for failure to establish respondeat superior. "An employer, of course, must have notice of alleged harassment before being held liable for not implementing action." *Radtke, supra*, 397. Here, the employee in question was a non-management employee, plaintiff did not tell anyone in a management position about the comment, and plaintiff does not allege that defendants knew or should have known about the comment. Therefore, with respect to that comment, plaintiff failed to show respondeat superior.¹ *Blankenship v Parke Care Centers, Inc*, 123 F3d 868, 872-873 (CA 6, 1997) (delineating employer liability for harassing conduct of plaintiff's co-worker). Further, the affidavit plaintiff submitted of another employee is insufficient to establish a prima facie case of racial harassment because, although that employee alleged that racial slurs had been made and the slurs were common knowledge, he did not state that plaintiff was subjected to those communications. Because plaintiff failed to demonstrate through documentary evidence that he was subjected to unwelcome conduct or communication involving his protected status he failed to establish a case of racial harassment on the basis of hostile work environment. *Quinto, supra*, 451 Mich 368-369.

IV

Plaintiff avers that the trial court erred in granting summary disposition regarding his retaliation claim. We again disagree. Elliott-Larsen prohibits employers from retaliating against an employee because he “made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.” MCL 37.2701; MSA 3.548(701); *McLemore v Detroit Receiving Hosp and University Medical Center*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). To establish a prima facie case of unlawful retaliation under the Elliott-Larsen Civil Rights Act, a plaintiff must show “(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and, (4) that there was a causal connection between the protected activity and the adverse employment action.” *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Plaintiff did file a claim with the Michigan Department of Civil Rights, and therefore had engaged in a protected activity. However, plaintiff failed to present any documentary evidence that defendants knew he had filed a claim. Defendants came forward with documentary evidence by way of affidavits and deposition testimony of defendants Hale and Barker in which they stated that they were not aware that plaintiff had filed a claim with the Michigan Department of Civil Rights. Plaintiff’s mere allegation that he believed that defendants knew of the complaint or that the Michigan Department of Civil Rights probably served defendants with the complaint before plaintiff ceased working is insufficient to overcome the motion for summary disposition. *Quinto, supra*, 451 Mich 362. If defendants were unaware of the complaint plaintiff filed there could have been no causal connection between the protected activity and plaintiff being disciplined. *Deflaviis, supra*, 223 Mich App 436. Therefore, summary disposition was properly granted pursuant to MCR 2.116(C)(10) regarding plaintiff’s claim of retaliation.

V

Finally, plaintiff argues that the trial court erred in granting summary disposition regarding his constructive discharge claim. We disagree. The Michigan Supreme Court has found that “a constructive discharge occurs only where an employer or its agent’s conduct is so severe that a reasonable person in the employee’s place would feel compelled to resign.” *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 328; 577 NW2d 881 (1998). An objective standard of reasonableness is applied to the action of the employee. *Id.* If a plaintiff establishes that they were constructively discharged, they are treated as if their employer actually fired them. *Id.*

As stated above, this Court finds that plaintiff has failed to show racial discrimination, racial harassment or retaliation in violation of the Elliott-Larsen Civil Rights Act. Therefore, plaintiff’s claim of constructive discharge on the basis of racial discrimination, harassment or retaliation fails because plaintiff cannot objectively show that defendants’ conduct was so severe

that a reasonable person in plaintiff's place would feel compelled to resign. *Jacobson, supra*, 457 Mich 328. Accordingly, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell

¹ The United States Supreme Court has recently delineated more stringent standards of vicarious liability where the harassing employee is in a supervisory position. *Faragher v City of Boca Raton*, 524 US 775; 118 S Ct __; 141 L Ed 2d 662 (1998). Because the alleged harasser in this case was not a supervisor, we need not apply the standards set forth in *Faragher*.